# Director of Forest Sarawak & Ors v Nicholas Mujah ak Ason & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–301 OF 2011
BALIA YUSOF, TENGKU MAIMUN AND VARGHESE GEORGE JJCA
23 MARCH 2018

*Land Law — Customary land — Native customary rights — Damages — Claim for — Allegations that timber companies encroached into native customary rights area — Whether timber companies had licence to work on disputed area — Whether area was forest reserve — Whether there was trespass*

The respondents ('the plaintiffs') were of Iban race and were from three different villages of Simunjan, Sarawak. They brought an action for themselves and on behalf of other villagers from four other villages for a declaration that they have a native customary right over an area located at Stika and Bukit Bediri, Simunjan. The first defendant in High Court, a timber company, was issued with a license to extract logs from the said area while the second defendant was the contractor engaged by the first defendant. The Directors of Forests, Sarawak, the Superintendent of Lands and Surveys, Sarawak and the Government of the State of Sarawak were sued as the third to the fifth defendants ('the state government'). According to the plaintiffs, the logging activities of the first and second defendants ('the timber companies') had illegally encroached into their communal land which were forest reserves. The timber companies argued that the timber licence was issued to the first defendant in 1966 and they have been working in the licensed area since then without any complaints. The timber companies argued that under *Gazette* Notification No 760, only the Ibans under Penghulu Berong were entitled to the rights and privileges over the forest reserve and these rights and privileges were subject to the control of the Direct of Forests. The High Court granted judgment to the plaintiffs in the following terms: (a) the plaintiffs had inherited native customary rights over the Bukit Bediri Forest Reserve and Stika Forest; (b) the construction of the rail line across these two Forests constituted an encroachment and a trespass of the land; and (c) the defendants were jointly and severally liable to pay damages. Hence the present appeal.

**Held**, dismissing the appeal and affirming the order of High Court:

(1) There was no merit in the appeal. There was clear evidence that the encroachment and the logging activities of the timber companies destroyed the plaintiffs' sources of livelihood, the destruction of their rubber gardens, farm land, old settlement site with orchard gardens,

burial grounds and sacred sites, valuable trees and the encroachment and logging activities caused erosion to the plaintiffs' land and polluted their rivers. The High Court judge ('the HCJ') was correct in concluding that there was no outright rejection of the establishment of the plaintiffs' native customary rights by foraging for food in the jungle (see paras 40, 44 & 52).

(2) In respect of trespass or encroachment of the rail line, there was no appealable error in the HCJ's finding that the rail line had been built right across Stika forest and had traversed part of the Bukit Bediri Forest Reserve. Notwithstanding that the rail line was built over swampy lands, the encroachment had interfered with the plaintiffs' livelihood as the plaintiffs could still carry out activities on and derived benefits from the swampy land. Destruction would ensue arising from the construction of the rail line. Furthermore, apart from the approval given for the construction of the rail line, there was no other evidence adduced to show pursuant to the approval, the Director of Forests had issued any direction or order that the exercise of the plaintiffs' subsisting right be limited (see paras 46–47 & 50).

**[Bahasa Malaysia summary**

Responden-responden ('plaintif-plaintif') merupakan kaum Iban dan datang dari tiga kampung berasingan di Simunjan, Sarawak. Mereka memulakan satu tindakan bagi diri mereka sendiri dan bagi pihak orang-orang kampung dari empat lagi kampung bagi satu deklarasi bahawa mereka mempunyai hak adat anak negeri atas satu kawasan yang terletak di Stika dan Bukit Bediri, Simunjan. Defendan pertama di Mahkamah Tinggi, sebuah syarikat pembalakan, diberi lesen untuk membalak di kawasan tersebut manakala defendan kedua adalah kontraktor defendant pertama. Pengarah Perhutanan Sarawak, Superintenden Tanah dan Survei Sarawak dan Kerajaan Negeri Sarawak disaman sebagai defendan ketiga dan kelima ('kerajaan negeri'). Menurut plaintif-plaintif, aktiviti-aktiviti pembalakan defendan pertama dan kedua ('syarikat pembalakan') telah, dengan salah, memasuki tanah komunal yang merupakan hutan simpan. Syarikat pembalakan menghujahkan bahawa lesen pembalakan dikeluarkan oleh defendan pertama pada 1966 dan sejak itu, mereka berkerja di kawasan berlesen tersebut tanpa apa-apa aduan. Syarikat pembalakan menghujahkan bawah Pemberitahuan Warta No 760, hanya orang Iban bawah Penghulu Berong yang mempunyai hak dan keistimewaan terhadap hutan simpan tersebut dan hak dan keistimewaan ini tertakluk pada kawalan Pengarah Perhutanan. Mahkamah Tinggi memberi penghakiman berpihak pada plaintif-plaintif dalam terma-terma berikut: (a) plaintif-plaintif mewarisi hak adat anak negeri terhadap Hutan Simpan Bukit Bediri dan Hutan Stika; (b) pembinaan laluan kereta api sepanjang kedua-dua hutan ini membentuk pemasukan dan pencerobohan; dan (c) defendan-defedan

bertanggungan membayar ganti rugi secara bersesama dan berasingan. Oleh itu rayuan ini.

**Diputuskan**, menolak rayuan dan mengesahkan perintah Mahkamah Tinggi:

(1) Tiada merit dalam rayuan. Terdapat bukti jelas bahawa pemasukan dan aktiviti pembalakan syarikat pembalakan telah memusnahkan sumber kehidupan plaintif-plaintif, kebun-kebun getah, ladang-ladang, kawasan pendudukan lama dengan dusun-dusun, kawasan tanah pengebumian dan suci, pokok-pokok bernilai dan pemasukan dan aktiviti pembalakan menyebabkan keruntuhan pada tanah plaintif-plaintif dan mencemar sungai-sungai mereka. Hakim Mahkamah Tinggi ('HMT') betul dalam menyimpulkan bahawa tiada penolakan langsung kewujudan hak adat anak negeri plaintif-plaintif untuk mencari makanan di hutan (lihat perenggan 40, 44 & 52).

(2) Dalam pencerobohan atau pemasukan laluan kereta api, tiada kekhilafan yang boleh dirayu dalam dapatan HMT bahawa laluan kereta api dibina sepanjang hutan Stika dan merentasi bahagian Hutan Simpan Bukit Bediri. Tanpa mengira laluan kereta api dibina atas tanah payah, pemasukan ini telah campur tangan kehidupan plaintiff-plaintif kerana plaintif-plaintif masih boleh menjalankan aktiviti-aktiviti atasnya dan mendapat manfaat daripada tanah paya ini. Kemusnahan akan berlaku akibat pembinaan laluan kereta api ini. Tambahan lagi, selain kelulusan yang diberi bagi pembinaan laluan kereta api, tiada apa-apa keterangan yang dikemukakan untuk menunjukkan susuan kelulusan ini, Pengarah Perhutanan telah mengeluarkan apa-apa arahan atau perintah bahawa penjalanan hak plaintif-plaintif yang wujud adalah terhad (lihat perenggan 46–47 & 50).]

**Notes**

For cases on native customary rights, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3473–3474.

**Cases referred to**

*Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805, FC (refd)

*Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)

*Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543, HC (refd)

*Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

**Legislation referred to**

Evidence Act 1950 ss 101, 103
Forests Ordinance (Cap 123) ss 4(1), 40

*Mohd Adzrul bin Adzlan (Sarawak State Attorney General's Chambers) for the appellants.*
*Baru Bian (Simon Siah Sy Jen and Chua Kuan Ching with him) (Baru Bian) for the respondents.*

**Tengku Maimun JCA (delivering judgment of the court):**

**[1]** This is an appeal by the appellants/the third to the fifth defendants against the decision of the High Court in entering judgment for the respondents/plaintiffs for, inter alia, a declaration that the respondents/plaintiffs have native customary rights over land in Bukit Bediri Forest Reserve and Stika Forest and that the construction of a rail line over the two forests constituted an encroachment and trespass of the land within the two forests. We heard the appeal on 10 February 2014 and had dismissed the same. We now give our reasons. For convenience, parties will be referred to as they were in the High Court.

BACKGROUND FACTS

**[2]** The plaintiffs are of Iban race and are from three different villages situated in a small rural town of Simunjan located in the First Division, Sarawak.

**[3]** The plaintiffs brought this action for themselves and on behalf of other villagers from four other villages for a declaration that they have native customary rights over an area located at Stika and Bukit Bediri, Simunjan.

**[4]** The first defendant, a timber company was issued with a licence to extract merchantable logs from the said area whereas the second defendant is the contractor engaged by the first defendant to do the felling and extraction of the logs. The Director of Forests, Sarawak, the Superintendent of Lands and Surveys, Sarawak and the Government of the State of Sarawak were sued as the third to the fifth defendants respectively.

**[5]** In their statement of claim, the plaintiffs pleaded that the logging activities of the first and the second defendants had illegally encroached into their communal land, the Bukit Bediri and Stika Forest Reserves. These forest reserves were *gazetted* in 1959 by the state government as communal forest vide *Gazette* Notification No 760.

A **[6]** In particular, the plaintiffs stated that the rail line built by the first and/or the second defendant over the said area had caused serious damage to its environment, leading to the loss of its timber, polluting its river system and thus causing serious damage to the plaintiffs' livelihood.

B **[7]** The plaintiffs took action to complain to the District Officer of Simunjan, and to the Sarawak Forestry Corporation. Police reports were also lodged. The plaintiffs took steps to erect physical blockades at Bukit Bediri on 14 September 2006. These actions by the plaintiffs however failed to resolve the dispute. On 4 July 2007, this action was filed wherein the plaintiffs claimed C for declaratory reliefs in respect of the plaintiffs' entitlement to the said area, including the constitutionality of the timber licence. The plaintiffs also claimed for aggravated and exemplary damages to be paid for the alleged trespass to their land.

D **[8]** The first and the second defendants ('the timber companies') in their statement of defence pleaded that the timber licence was issued to the first defendant way back in 1966 and that since then, they have been working in the licensed area without interference or complaint by the plaintiffs until the time E and events which led to the filing of this action. The timber companies thus contended that there was inordinate and inexcusable delay on the part of the plaintiffs in filing this action.

**[9]** Relying on *Gazette* Notification No 760, the timber companies also F pleaded that only the Ibans (or Sea Dayaks) under Penghulu Berong were entitled to the rights and privileges over the Bukit Bediri Forest Reserve and even so, these rights and privileges are subject to the control of the Director of Forests.

G **[10]** The third to the fifth defendants (collectively referred to as 'the state government') denied that there was such a communal reserved land as shown in Map 'M' attached to the plaintiffs' statement of claim. The area shaded in Map 'M' according to the state government, is in fact the Bukit Bediri Forest Reserve of which no native customary rights could be created over it.

H **[11]** The state government further denied that *Gazette* Notification No 760 established both the Bukit Bediri Forest Reserve and Stika Communal Forest as claimed by the plaintiffs. The state government also denied that the timber licensed area encroached into the Bukit Bediri Forest Reserve. It was pleaded by I the state government that before the timber licence was issued to the first defendant, the licensed area was still primary jungle as shown by aerial photographs taken in 1951, 1954 and 1955. The state government thus took the position that the plaintiffs have no native customary rights over the said Forests. The state government also contended that there had been inordinate

delay on the part of the plaintiffs in bringing this action.

PROCEEDINGS IN THE HIGH COURT

**[12]** Several witnesses gave evidence for the plaintiffs. The learned trial judge heard Nicholas Mujah ('PW1') who testified on his villagers' and his inherited rights. Map 'M' attached to the statement of claim was drawn by PW1 from the Global Positioning System ('GPS') coordinates taken of the logging activities. The map ('exh P1') shows that the said activities were inside the boundary of the communal forest area which PW1 identified as Stika and Bukit Bediri Forests. PW1 listed seven villages sharing these communal forests.

**[13]** It was the evidence of PW1 that the encroachment and logging activities of the timber companies have destroyed their sources of livelihood, destroyed their rubber gardens, farm land, *tembawai* (old settlement sites with orchard garden), the valuable merchantable trees such as *belian* and *meranti* and had caused erosion to their land and polluted their rivers.

**[14]** The learned trial judge also heard the testimony of Penghulu Athan ak Asong ('PW2') who was about 65 years of age when he gave evidence. PW2 testified that he was a councillor with Simunjan District Council and was the third Penghulu for the villages around the Sebangan River. As Penghulu, PW2 was also a Superior Native Court judge.

**[15]** PW2 echoed the evidence of PW1 as to how their grandparents and/or parents had not only cultivated the said area with rubber trees and fruit trees but had also used it for their burial grounds and sacred sites; that their people depend on the two forests as their sources of livelihood, for the fishes, wild games and timber as the surrounding forest have all been cleared for oil palm cultivation. PW2 also testified on the encroachment of their communal forests and the damages suffered by them arising from the illegal logging by the timber companies.

**[16]** Mr Nicholas Bawin ak Anggat ('PW3'), explained how the Ibans established their native customary rights over the land. He also gave his explanation on the concept of *pemakai menoa*, *tanah umai*, *pulau galau*, *pulau bais*, *pulau buah* and *tembawai*. PW3 who held the post of Deputy President of Majlis Adat Istiadat Sarawak from 12 August 1992–February 2005 is an authority on Iban customs for his evidence has been received by the courts in a number of cases, including in *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769.

**[17]** For the defendants, evidence was led to establish that there was only Bukit Bediri Forest Reserve which was constituted vide the *Gazette*

Notification No 760. The *gazette* notification published on 3 June 1952 recognised and provided for the rights of seven longhouses and 20 persons. The rights are spelt out as follows:

(a) to take timber, poles, fuel, rattan and other climbers, bamboo, dammar, fruit, honey, beeswax and ataps for their own domestic use and for boat-building but not for sale or batter, provided that the quantity of, and the place and manner of collection of such forest produce shall be subject to the control of the Conservator of Forests; and

(b) to hunt game and catch fish, provided the exercise of this right shall be subject to the provisions of the laws of Sarawak relating to hunting and fishing.

(c) to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve on condition that no more virgin forest is felled.

**[18]** We do not wish to set out the seven longhouses, suffice to state that PW2 in his evidence was able to identify the longhouse he belonged to from the ones listed in the Schedule. He was also able to connect the villages in this action to the seven longhouses listed in the Schedule. Further, PW2 was able to name the present Tuai Rumah or the longhouse chief in charge of each village, in place of those named in the *Gazette* Notification No 760.

FINDINGS OF THE HIGH COURT

**[19]** On the strength of the evidence of PW2, which the learned trial judge found not contradicted, Her Ladyship accepted that the plaintiffs and the people they represent from the seven villages named in this action have inherited the benefits spelt in, and from those named in the *Gazette* Notification No 760.

**[20]** The learned judge formed the view that the benefits conferred in *Gazette* Notification No 760 are akin to that exercisable by Iban claimants of native customary rights under their concept of *pemakai menoa* and *pulau*. By *gazetting* the Bukit Bediri Forest Reserve, the learned judge opined that the state government had recognised that those named therein, and now the plaintiffs after them, have native customary rights over the said forest.

**[21]** The learned judge further found, from the evidence tendered by the state government that there was a proposal to constitute a communal forest known as Stika Communal Forest. This proposal was made in 1953. This proposed proclamation also contained a list of longhouses which would benefit from the constitution of this communal forest. The benefits are listed in Schedule II which duplicates that of longhouses listed in the Bukit Bediri

Forest Reserve's *Gazette* Notification No 760. The learned judge was of the view that had the proposed proclamation been *gazetted*, the plaintiffs' claim for native customary rights to Stika Forest would have been proved.

**[22]** The learned judge further found that the plaintiff's allegation of the encroachment by the timber companies by their illegal logging and the building of the rail line was proven through Map 'M' which had shown and shaded the areas where the alleged encroachment occurred. This map was challenged by the defendants who questioned PW1, an unregistered land surveyor, on his knowledge and expertise in producing that map.

**[23]** Although the map was admitted as evidence without objections by the defendants' counsel, the learned judge ruled that very little weight could be attached to it since the maker is not an expert on map drawing. Her Ladyship declined to rely on the map to establish the allegation of encroachment made by the plaintiffs. On the whole, the learned judge found the evidence on the alleged encroachment by the illegal logging to be unsatisfactory and not sufficient to discharge the burden of proving their case under ss 101 and 103 of the Evidence Act 1950.

**[24]** Her Ladyship nevertheless found that the encroachment by the construction of the rail line has been more than satisfactorily proven. The finding was based, inter alia, on the evidence presented by the state government in the very maps prepared by the Forest Department and by the Land and Survey Department, Samarahan Division (p 1 of exh D2 and p 2 of exh D2 respectively). The rail line is clearly shown in these two maps to have been drawn right across the Stika Forest and traversed part of the Bukit Bediri Forest Reserve, to connect the area under the timber licence given to the first defendant which was separated by the two forests. The learned judge found this evidence as the definitive evidence that there was encroachment of the two forest areas and for which restitution must be made to the plaintiffs.

**[25]** The learned judge's conclusion on the issue of encroachment was also based on the evidence of Mr Tiong Ching Cheong ('DW1'), the camp manager of the second defendant. DW1 testified that the rail line was built over swampy lands which were prone to flooding and which were not suitable for human settlement, cultivation of crops or planting of fruit trees. Her Ladyship found that since the plaintiffs' claim is not for land which they lived and cultivated on but one which they forage for food, hunt and fish, the swampy land does not render all these impossible because it is common knowledge in Sarawak that certain fresh water fishes such as catfish thrive in swampy land; that the natives eat an endemic plum called 'asam payak' which grows only on its soil and that another indigenous plant, the 'nibong tree' which grows on swampy land is usually eaten for its shoot and the trunk used as a building material.

**[26]** Judgment was thus granted by the learned judge to the plaintiffs in the following terms, with costs:

(a) the plaintiffs have inherited native customary rights over the Bukit Bediri Forest Reserve and the Stika Forest, the boundaries of which are as delineated and shown in maps produced by the Forestry Department Sarawak and Land and Survey Department Sarawak appearing at pp 1–2 of exh D4;

(b) the construction of the rail line across these two forests constitutes an encroachment and a trespass of the land; and

(c) the defendants are jointly and severally liable to pay damages to be assessed by the deputy registrar, to the plaintiffs (except those from Kampung Stika who have been compensated) for the said trespass.

**[27]** Aggrieved, the state government appealed to this court.

THE APPEAL

**[28]** Learned state counsel raised two issues before us, namely: (i) whether the first order or declaration granted by the learned judge was correct or whether it should be varied; and (ii) whether the plaintiffs have established a case of trespass.

**[29]** It was submitted for the state government that there is no dispute that the areas claimed by the plaintiffs fall within the Bukit Bediri Forest Reserve and the proposed Stika Communal Forest, and that the nature and extent of the rights of the native communities are set out in the *Gazette* Notification No 760 and the Proclamation for the proposed Stika Communal Reserve.

**[30]** Highlighting paras (a) and (c) of the Second Schedule of *Gazette* Notification No 760, learned counsel argued that under para (a), foraging does not apply and that under para (c), there cannot be any new area cleared by the plaintiffs. The proper order that should have been made by the learned judge, according to learned counsel, is that the plaintiffs have such rights in the Bukit Bediri Forest Reserve and in the proposed Stika Communal Forest as are set out in the *Gazette* Notification No 760 and in the Proclamation for the intended Stika Communal Forest, respectively.

**[31]** On the issue of trespass, it was argued for the state government that there is no evidence that the rail line traversed any of the *temuda* or the cultivated and cleared areas or had destroyed any vegetation from which the plaintiffs derived their forest produce. It was further argued that the learned judge's finding on the activities or benefits derived by the plaintiffs from the swampy land is not supported by evidence. And even if the rail line was built in

the area where the plaintiffs forage for food, hunt or fish, which rights are subject to the consent of the Director of Forest, the learned judge made no finding that the rail line had in any way interfered with or affected the plaintiffs' said rights or activities.

**[32]** Further, by virtue of ss 4(1) and 40 of the Forests Ordinance Chapter 126, forest reserve and communal forest, respectively, are constituted over state land. Once a forest reserve or a communal reserve is constituted, the native communities whose rights are admitted can only use the forest reserve or the communal forest in accordance with the conditions imposed by the Director of Forests. In the premises, it was the contention of the state government that the decision of the Director of Forests to allow the rail line over the state land cannot in law be trespass to the land as stated in the second order granted by the learned judge.

**[33]** In response, learned counsel for the plaintiffs submitted that rights (a) and (b) of the Second Schedule clearly refers to the use or benefits exercisable by the longhouses over their *pulau* and *pemakai menoa* respectively. In this regard, learned counsel cited the judgment of the Federal Court in *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805 where His Lordship Richard Malanjum, Chief Judge of Sabah and Sarawak said at p 155 (MLJ); p 828 (CLJ):

> [47] To begin with it may be useful to understand the various terminologies under the NCL, namely:
>
> > 'pemakai menoa' is a term given to an area of land selected by pioneers of a longhouse community who are usually related to each other for the construction of 'a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families'. And the longhouse will 'just expand to with new families'. And it is within the 'pemakai menoa' that the longhouse community will establish 'temuda' which is an area of land accessible for farming and 'pulau' or 'pulau galau' which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce. The other Iban terms are 'tembawai' for old longhouse site; 'tanah umai' for cultivated land within 'pemakai menoa' and 'pendam' is cemetery. However, 'pemakai menoa' has its boundary usually based on streams, watersheds, ridges and permanent landmarks, separating it from another longhouse community' (see: *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and Another Appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 (CA)).

**[34]** And at p 159 (MLJ); p 833 (CLJ), His Lordship the Chief Judge of Sabah and Sarawak stated:

> [64] In respect of the intended purpose, NCL were created and existed by and for the natives in Sarawak. NCL are basically meant:

A (i) for farming ('temuda/tanah umai') on the land within 'pemakai menoa' that is 'an area of land held by a distinct longhouse or village community, and includes farms, garden, fruit groves, cemetery, water and forest within a defined boundary (garis menoa)';

(ii) for fishing in the rivers therein; and

B (iii) for the gathering of forest produce such as bamboo, 'damar' (resin) and timber for building boats and houses from the jungles ('pulau' or 'pulau galau').

C **[35]** Based on the above quoted judgment coupled with the description of rights (a) and (b) in the Second Schedule, the plaintiffs submitted that there is no doubt that the *Gazette* Notification No 760 was referring to the longhouses' rights or benefits exercisable by the Iban plaintiffs over their *pulau* and *pemakai menoa*. Relying on a host of authorities (which we find no necessity to D reproduce) which confirmed *temuda*, *pemakai menoa* and *pulau* as the Iban custom creating native customary rights, learned counsel for the plaintiffs submitted that the learned judge made no error in finding that the Bukit Berdiri Forest Reserve and the proposed Stika Forest Reserve expressly or impliedly acknowledged the plaintiffs' native customary rights over the two E forests.

**[36]** The plaintiffs further submitted that the learned judge was likewise correct in her findings of fact in respect of the issue of encroachment by the rail line. Learned counsel argued that the subsisting rights at para (a) of the Second F Schedule provide for generally the taking of jungle produce. In the process of the construction of the rail line, the trees listed under para (a) would be felled, depriving the plaintiffs, the use of those trees. Further, when the forests are felled, the natural habitat of wild game and fishes are under threat through water pollution from soil erosion; food sources of the animals are cut short and G soil dumping would also be another cause for water pollution in the area.

OUR FINDINGS

**[37]** The *Gazette* Notification No 760 (record of appeal Vol II: p 377) reads:

H In exercise of the powers conferred on him by section 12 of the Forests Ordinance, the Chief Secretary hereby constitutes, with effect from 1st June 1952, the land enclosed within the boundaries described in the First Schedule hereto a Forest Reserve subject to the rights conceded and special conditions attached specified in the Second Schedule hereto.

I

**[38]** The Second Schedule of *Gazette* Notification No 760 expressly states that the forest reserve is constituted for the benefit of the permanent inhabitants of the seven longhouses. In addition, 20 persons are listed as persons that shall have the right to retain possession of rubber and pepper

gardens planted prior to the constitution of the forest reserve. From the evidence of PW2, those rights have been inherited by the plaintiffs.

**[39]** The rights as stated in paras (a), (b) and (c) of the Second Schedule are generally, for the inhabitants to take forest produce; to hunt game and catch fish and to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve, respectively.

**[40]** There was clear evidence before the learned judge that the encroachment and the logging activities of the timber companies have destroyed the plaintiffs' sources of livelihood, the destruction of their rubber gardens, farm land, old settlement sites with orchard gardens, burial grounds and sacred sites, valuable trees and that the encroachment and logging activities had caused erosion to the plaintiffs' land and polluted their rivers.

**[41]** The learned judge considered the case of *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 where this court expressed agreement with the trial judge's decision in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543 that native customary rights claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. This court in *Nor ak Nyawai*, stated that 'such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food'.

**[42]** Her Ladyship went on to cite the following statements of this court in *Nor ak Nyawai*:

> On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, in the circumstances of this case under appeals, the claim for the area to be under native customary rights is a non-starter. And it follows that the issues of which statute is applicable or whether the area was abandoned do not arise. Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available.

**[43]** The learned judge concluded thus:

> The above quoted passages from the Court of Appeal's judgment therefore show that there is no outright rejection, nor should it be, of the establishment of plaintiffs' native customary rights by foraging for food in the jungle. Although it is indeed logical that there be limit to the area where the foraging should be recognised as establishing native customary rights, but in this case, that the limit has been set by the constitution of the Bukit Bediri Forest Reserve and in the proposal to proclaim

A the Stika Forest as a communal forest. The documents in proof of these, ie *Gazette* Notification No 760 and the proposed proclamation, both tendered by the defendants themselves, are the express and implied acknowledgement of the plaintiffs' native customary rights over the two forests.

B In the face of these written documents, I see no necessity to refer to the evidence of the aerial photographs to resolve the plaintiffs' claim of native customary rights over the two forests and is also the reason why I chose not to dwell at length on the testimonies of the witnesses at the trial.

C **[44]** We found that the learned judge was correct in concluding that there was no outright rejection by this court of the establishment of plaintiffs' native customary rights by foraging for food in the jungle. Indeed, that position is borne out by the statement of this court in *Nor ak Nyawai* that 'this case should not necessarily be a precedent for other potential claims where proof may be readily available'.

D

**[45]** In any event, paras (a) and (b) of the Second Schedule of the *Gazette* Notification No 760 clearly provide for the plaintiffs to take timber etc, and to hunt game and catch fish in the Forest Reserve, which in our judgment, is E consistent with the plaintiffs' custom of *pulau* and *pemakai menoa* as explained by the Federal Court in *Bisi ak Jinggot*. We therefore found no appealable error on the part of the learned judge in making the first order as set out in para [26] above.

F **[46]** In respect of trespass or encroachment by the rail line, we similarly found no appealable error on the part of the learned judge in her finding that the rail line had been built right across Stika Forest and had traversed part of the Bukit Bediri Forest Reserve. We agreed with the learned judge's finding that notwithstanding that the rail line was built over swampy lands, the G encroachment had interfered with the plaintiffs' livelihood as the plaintiffs could still carry out activities on and derived benefits from the swampy land.

**[47]** PW1 and PW2 gave evidence that the encroachment and the logging H activities had destroyed the plaintiffs' livelihood through, inter alia, the destruction of their rubber gardens, farm land and the clearing of forest areas which are their source of wild game, fishes and timber. We opined, it makes sense that the same destruction would ensue arising from the construction of the rail line.

I

**[48]** The point raised by the state government that since the rail line had been approved by the Director of Forests, there could not be a case of trespass, had been considered by the learned judge. In dealing with the issue which was then raised by the timber companies, Her Ladyship stated thus:

> Ms Esther Wong in her written submission also said her clients' construction of the rail line being approved by the Director of Forests, they have therefore not committed any actionable wrong. In answer to this submission, I would just refer to three things. First, the timber licence granted to her client appearing at pp 1–33 of their Bundle of Documents Ex D1 and more specifically to cl 28 thereof which they themselves highlighted in green, provides that it is '*granted subject to the native and other rights specified in section 65, of the Forest Ordinance*'. (Emphasis added.) Section 65 allows the felling of timber (other than in a forest reserve) for domestic use. Secondly, it is in her submission that the working plan and a plan for road access or rails were submitted by her clients to the Forest Department for approval ... Lastly, a locality map was also attached to the timber licence. What I can deduce from these collective facts and the only logical inference to be made from them is that the timber companies were aware right from the start that their licence is subject to native right and when they submitted the plan for the rail line, it was transversing *(sic)* the two Forests.
>
> By submitting such a plan, the timber companies therefore cannot deny liability of wrongdoing against the plaintiffs. Similarly by approving that plan, the Director of Forests (and the Government of Sarawak) is conjointly liable to the plaintiffs who did not receive compensation for the construction of the rail line. As for those who did receive compensation, ie the villagers from Kampung Stika it would only be fair that they be excluded from receiving such payment of damages.

**[49]** We agreed with the learned judge on the above findings. Clause 28 of the timber licence No T/5090 (record of appeal Vol II: p 352) states that:

> This licence is granted subject to the native and other rights specified in section 65, of the Forests Ordinance, to all mining rights and rights in connexion therewith now existing or hereafter created and to all other lawful rights now existing.

**[50]** Further, apart from the fact that approval was given for the construction of the rail line, there is no other evidence adduced to show that pursuant to the approval, the Director of Forests had issued any direction or order that the exercise of the plaintiffs' subsisting rights be limited. In other words, there is no evidence to show that upon the issuance of the timber licence and/or the approval of the rail line, the rights of the seven longhouses and the twenty persons are subject to any other conditions imposed by the Director of Forests apart from the conditions already expressed in the Second Schedule of *Gazette* Notification No 760.

**[51]** Hence, in our view, the plaintiffs would still enjoy their subsisting rights over the native customary lands vide the *Gazette* Notification No 760 as claimed ie to collect jungle produce from the Forests, to hunt and to catch fish in the area where the rail line was constructed, so much as it traversed the forest reserves.

A CONCLUSION

**[52]** For the above reasons, we were unanimous in our view that there was no merit in the appeal. The appeal was accordingly dismissed and the order of the High Court was affirmed.

B

*Appeal dismissed, High Court order affirmed.*

Reported by Afiq Mohamad Noor

C

D

E

F

G

H

I